Submission by the United States
for the General Council,
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Work Program on Electronic Commerce

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In the General Council's May "Declaration on Global Electronic Commerce," WTO Members agreed to examine all trade-related issues relating to global electronic commerce and report to the third session of the Ministerial meeting with any recommendations. Members also agreed to review at that session their commitment to continue the practice of not imposing customs duties on electronic transmissions. The work of the WTO in the intervening months since May 1998 underscores the importance Members have accorded to these issues and revealed the breadth of issues to be discussed.

Electronic commerce is re-creating the United States' and the world's economy as liberalization and increased competition transform information-based industries. The open global economy places a premium on characteristics inherent to electronic commerce--the ability to respond to markets without concern for geography and time through a medium that is ubiquitous and instantaneous. The rate at which electronic commerce brings benefits to any particular country will depend on how fast it liberalizes its market and adopts a predictable trade regime–the essential conditions for encouraging the enormous investments in technology required by electronic commerce. How the WTO can contribute to this goal should be the main object of the "Work Program on Electronic Commerce."

Given the undefined nature of electronic commerce and its potential to affect most aspects of trade, Members agreed to undertake elements of the Work Program in a parallel fashion, among the various WTO bodies with different competencies. Precisely because electronic commerce is so difficult to categorize, however, the oversight of the General Council remains essential--to ensure that no relevant elements go unexamined, that cross-cutting issues are examined from a broad perspective and that any conflicts of jurisdiction are resolved. The duty-free status of electronic transmissions is obviously a cross-cutting issue. So, too, are certain definitional questions, such as how elements of electronic commerce do or do not fit into established categories of goods and services.

Various WTO bodies are now examining the trade-related aspects of electronic commerce within the framework identified for the Work Program, adopted at the September 30 General Council (WT/L/274). The range of WTO disciplines that could affect electronic commerce is broad, involving services, intellectual property, goods, government procurement, TRIPS, and technical barriers to trade (standards). While these general disciplines may be broad enough to embody the trade-relevant needs of electronic commerce, the evolving nature of this medium may also reveal shortcomings of traditional approaches.

In terms of the framework set out at the September 30 General Council, there are a number of unanswered questions for consideration by Members.

Increasing Participation by Developing Countries

A key issue for developing countries is building an infrastructure that supports electronic commerce. It may be useful for Members to explore what are effective strategies for attracting investment (domestically and from abroad) in information technology equipment and telecommunications infrastructure, and the trade regimes supporting such strategies.

Some countries have sought to restrict market access and competition in an attempt to guarantee the returns on investment in infrastructure that provide the bandwidth for electronic commerce. However, there is evidence that such a strategy only keeps the price of bandwidth high, reduces the variety of services offerings relevant to electronic commerce and impedes economic development. Similarly, we should ask ourselves (1) whether there is the risk that governments will underestimate the demand for bandwidth and the amount of investment that is needed, and (2) whether this risk is not eliminated when decisions are based on a fully competitive, private marketplace. We should also look at the emerging evidence that Members that have committed to broad market access, a competitive basic telecom regime, and low tariffs in information technology are reaping the greatest benefits from electronic commerce.

To complement activities and commitments regarding infrastructure, each WTO Member should consider development assistance initiatives that foster the growth of infrastructure, access to information technology and technical know-how relevant for electronic commerce. In November, 1998, the U.S. Government launched an initiative on the Internet and developing countries. The U.S. initiative seeks to assist in policy reform that is aimed at liberalization, open competition and universal access. The key for successful initiatives will be a focus on the ability for small- and medium-sized enterprises to use the Internet in a way that allows them to "leap frog" into the information age and reap the benefits early rather than late. The Committee on Trade and Development Secretariat Note (WT/COMTD/W/51 of 19 November 1998) highlighted a few of those benefits.

During the course of the Work Program, delegations might recognize that the promotion of the Internet is one of the most effective ways of facilitating technology transfer as it provides users instant access to a wealth of technical information, publicly available software, and interactive learning opportunities.

Electronic commerce may empower less developing countries in the same way it empowers individual consumers with increased bargaining power through greater access to information and the ability to better judge market conditions.

Customs duties

The most unambiguous way to ensure liberalized customs treatment of electronic commerce is to make permanent the moratorium on customs duties on electronic transmissions.

> Are there any compelling reasons why Members would be unable or unwilling to take this simple, unambiguous step to place electronic commerce in a liberalized context?

It has been suggested that duty-free treatment of electronic transmissions could be trade distortive, as it diverts trade that may otherwise have occurred through physical medium into an electronic medium.

> Is there any evidence that electronic commerce is trade diverting? If it did prove to be diverting, is it not likely that it would result in a greater overall level of trade, both in narrow products directly connected to electronic commerce, and in the ancillary products and services indirectly connected to electronic commerce (e.g. computers, telecommunications services, software, etc.)? That being the case, would this not be a positive development?

Scope

Most market access commitments for electronic commerce activities fall under Members' service commitments. Apart from narrow exceptions (for example in GATS Article I), all service sectors are currently covered by the GATS. As specific market access and national treatment commitments in services depend on Members' explicit schedules, and since electronic commerce may give new importance to a broad range of services, Members may find it useful to review the extent to which the range of their GATS commitments and those of their trade partners capture electronic commerce-related services. However, there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality.

In terms of further issues to be explored relating to the scope of service commitments relating to electronic commerce, Members may want to consider some of the following approaches to examine the range of issues:

> Which services become inherently more "tradable," particularly on a cross-border or consumption abroad mode, through electronic commerce? Has the Internet, for example, brought economic viability to the international provision of retailing, which was previously inhibited by different time zones and the high price of international phone calls? Are cross-border auction services now meaningful in ways not thought of previously? As networked appliances and machines become a reality, is remote monitoring, metering, and diagnostics likely to become an important trade activity?

> What services related to electronic commerce are undisputably "new" and, thus, could benefit from Members making new commitments to bring them under WTO disciplines? For example, do Web-hosting services, electronic authentication services or data "push" services fall under any traditional categories such as value-added services or data processing, or would more explicit commitments provide valuable certainty for the provision of these services?

Modes of Delivery

While the most complete way to ensure a liberalized service regime in electronic commerce is to make commitments and minimize restrictions across all four modes of delivery, countries' commitments differ depending on the specific mode that is scheduled. As noted in the WTO's 1998 "Special Report on Electronic Commerce and the WTO," electronic commerce appears to have particularly important implications for expanding trade in modes 1 and 2. Based on data in this report, service commitments on Mode 2 appear, in general, to be more comprehensive.

> Given this fact, what are the implications of considering services delivered electronically, accessible from another member's economy, to be mode 2 service, based on the fact that consumers can "visit" foreign web sites electronically, and initiate transactions at those sites? Is there any disadvantage to characterizing an electronic commerce service involving access to a foreign-based Website as "consumption abroad"? Since it is not feasible or practicable to limit consumers' access to Websites based on a site's location, are Article VI limitations on such access even meaningful?

It might be that electronic commerce will expand the scope of services traded on a "cross-border" and "consumption abroad" basis.

> Will this phenomenon replace the currently held preference for establishing a commercial presence in a foreign market?

Procurement

It would be useful for Members to examine how electronic commerce is influencing areas where governments interact commercially with the private sector. The use of electronic commerce may have increased opportunities for bidding on government procurement contracts, particularly for small and medium sized companies. This might logically contribute to lower costs for governments.

Intellectual Property

The advent of digital technology, with its ability to create perfect reproductions of works at minimal cost, creates a major challenge for IPR holders. They face an even greater challenge from the networked environment typical of electronic commerce, where IPR protection via control over the media (e.g. a CD) or the player may no longer be possible. If content is freely distributable through an open network and accessible by computers based on open standards, new and unique problems are created.

> How is the emergence of new distribution channels based on electronic commerce changing the economics of content distribution? What solutions are emerging to both protect IPR of content holders and exploit the efficiencies of the electronic distribution medium? How can such solutions be integrated into existing international disciplines?
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> Would it not be helpful to examine the responsiveness of the current framework to additional needs for effective protection of intellectual property rights, bearing in mind the interests of all members and the work undertaken in other international fora?

Classification

While some have suggested that all commerce based on electronic transmission is a service, this conclusion needs further examination.

> For example, are there products which tend be distributed electronically and generally are not marketed in tangible form? For example, electronic greeting cards, clip-art, Web-pages, Java-based "applets," and certain industrial designs might be created, distributed and used entirely within a network, without never acquiring a tangible form.

While the transmission of these products can certainly be characterized as a service, the products themselves are not consumed in their transmission, but rather retain a permanence analogous to the goods world. And yet, some may argue that these are not quite goods or services. Perhaps in the GATT context, before we approach the question of "goods or services," we could ask whether the item is an "importation" for tariff purposes.

> What would be the implication of a response that there is no importation for tariff purposes?
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> While such product have only recently become widely available, is the range and value of such products not likely to become a major component of electronic commerce?

It is not clear, as some would maintain, that anything intangible should be considered a service.

> In contrast, for example, what the implications of the long-standing practice of some WTO Members to classify "electricity" (clearly an intangible) as a good in their tariff schedules?

Given the broader reach of WTO disciplines accorded by the GATT (i.e. market access and national treatment are not dependent on specific commitments) there may be an advantage to a GATT versus GATS approach to such products which could provide for a more trade-liberalizing outcome for electronic commerce.

Transparency and Domestic regulation

Members should examine whether the growth in certain countries of the fast-developing nature of electronic commerce has been inhibited by regulation, due the difficulty of categorizing certain electronic commercial activities. Perhaps this problem is more pronounced in countries with more extensive licensing regimes, and which have greater difficulty applying relevant regulations.

> Are there significant cases of government authorities seeking to encompass electronic commerce in traditional regulatory categories, which burden electronic commerce and undermine the innovative nature of such services?

In many Member states, the widespread use of the Internet for providing regulatory information, filing forms and receiving authorizations, combined with the broad access to computers has greatly increased the transparency and efficiency of the regulatory regimes.

> What are the advantages of such approach, apart form the obvious issue of infrastructure and resources?

Standards

Although built on a suite of common protocols, the Internet (and the applications it has spawned) have defied traditional standards-making approaches. The speed of development of applications, and developers' ability to innovate with maximum flexibility, has been the source of enormous creativity and growth. In addition, the growing empowerment of users in the standards-making process (as seen in fora such as the Asynchronous Transfer Mode (ATM) Forum and certain authentication consortia) indicates a shift in the nature of some forms of technology development. In many instances it has become clear that applications would not have emerged successfully in the market if mandatory standards were imposed, or if a lengthy international standardization process had to be completed first. In other cases, international standards have been successfully developed, only to be shunned by users who demand alternative solutions based on factors such as cost or flexibility.

> Will the success of electronic commerce depend on governments minimizing their

involvement in standards-setting activities, unless there is a clear consensus that the private sector is unable to address relevant problems? Will attempts by governments or their proxies to develop standards to create national or regional advantages by championing certain standards undermine innovation and market-driven growth?

Access to and use of the telecommunications network

The GATS Telecommunications Annex, and the Group on Basic Telecom Reference Paper which guarantee access to and use of telecommunications networks, provides an important framework for establishing the rights of electronic service providers. Given the development of telecommunications and electronic commerce in the years since that the Annex and Reference Paper were introduced, Members should examine which elements affecting such access could be expanded.

For example, would it be useful to provide more specificity to the concept of "reasonable" rates for leased lines, which are generally an indispensable element and a major cost associated with electronic commerce?

In addition to leased lines, electronic commerce suppliers may benefit from additional commitments involving a greater unbundling of incumbents' communications networks? If so, Members should discuss key network elements that are relevant to electronic commerce.

With the advent of end-to-end international telecommunications service provided by one supplier, electronic commerce suppliers may want to own or acquire long-term leases in international circuits. In that context, Members might ask whether current regulatory regimes and WTO disciplines, which are generally designed with basic telecommunications carriers in mind, are comprehensive enough to support electronic commerce needs.

What in the basic telecommunications Reference Paper would apply to an electronic service supplier?

One of the most often-heard complaints of companies involved in electronic commerce is inadequate access to bandwidth traditionally provided by telecommunications carriers. This same issue might also arise with alternative bandwidth providers, e.g. cable TV providers or electricity providers.

What WTO disciplines best address ways to encourage investment in bandwidth and provide meaningful access to it?